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354-895—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

WINTON M. BLOUNT, POSTMASTER GENERAL,
PETITIONER

v.

UNITED FEDERATION OF POSTAL CLERKS, AFL–CIO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Postmaster General, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 12–26) is not as yet reported. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1969 (App. B, *infra*, p. 27). On a timely application, Mr. Chief Justice Warren extended the time for filing a petition for a writ of

certiorari to and including June 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provisions of the Federal Employees Salary Comparability Act of 1965, providing for overtime pay to an annual rate postal employee for work performed "in excess of his regular work schedule," entitles an employee who regularly works on five designated days to overtime pay when he is temporarily assigned to work on other days instead of but not in addition to his regular days.

STATUTE INVOLVED

39 U.S.C. (Supp. IV) 3571, 3573:

§ 3571. Maximum hours of work.

(a) A basic workweek is established for all postal field service employees consisting of five eight-hour days. The work schedule of employees shall be regulated so that the eight hours of service does not extend over a longer period than ten consecutive hours.

(b) The Postmaster General shall establish work schedules in advance for annual rate regular employees consisting of five eight-hour days in each week.

(c) Except for emergencies as determined by the Postmaster General, the hours of service of any employee shall not extend over a longer period than twelve consecutive hours, and no employee may be required to work more than twelve hours in one day.

(d) To the maximum extent practicable, senior regular employees shall be assigned to a basic workweek Monday through Friday, inclusive, except for those who express a preference for another basic workweek.

* * * * *

§ 3573. Compensatory time, overtime, and holidays.

(a) In emergencies or if the needs of the service require, the Postmaster General may require employees to perform overtime work or to work on holidays. Overtime work is any work officially ordered or approved which is performed by—

(1) an annual rate regular employee in excess of his regular work schedule,

(2) an hourly rate regular employee in excess of eight hours in a day or forty hours in a week, and

(3) a substitute employee in excess of forty hours in a week.

The Postmaster General shall determine the day and week used in computing overtime work. * * *

STATEMENT

This suit was brought by an annual rate postal employee and a postal employees union against the Postmaster General seeking declaratory and injunctive relief that, under Section 5 of the Federal Employees Salary Comparability Act of 1965, such employees are entitled to receive overtime compensation for work temporarily performed on days other than regularly scheduled work days, notwithstanding the fact that they still work only five days in the

week.[1] The district court granted summary judgment for the Postmaster General and the court of appeals reversed.[2]

Prior to 1965, most annual rate postal employees normally worked a Monday-through-Friday schedule.[3] They could also be required to work on Saturday or Sunday (the sixth or seventh day of the week), however, provided that, within five days thereafter, they received compensatory time-off for the extra work performed. 39 U.S.C. (1964 ed.) 3573. Premium compensation for such overtime was not authorized by the statute (*ibid.*).

The concept of a fixed Monday-through-Friday workweek for such employees was rejected in Section 5 of the 1965 Salary Act. Section 5 authorized the Postmaster General to "establish work schedules in advance for annual rate regular employees consisting of five eight-hour days in each week." 39 U.S.C. (Supp. IV) 3571(b). It further provided that such employees were to receive overtime pay for work performed "'in excess of [their] regular work schedule.'" 39 U.S.C. (Supp. IV) 3573(a)(1); see pp. 6–9, *infra*.

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[1] For purposes of applying the overtime pay provisions, the Act defines "Annual rate regular employee" as "an employee for whom the Postmaster General has established a regular work schedule consisting of five eight-hour days * * *." 39 U.S.C. (Supp. IV) 3573(h)(1).

[2] The court of appeals rejected the Postmaster General's contention that the respondent union lacked standing to maintain this suit on behalf of its members. The Postmaster General is not seeking review of that determination.

[3] Some employees, however, regularly worked on Saturday and Sunday as part of their five-day week.

Pursuant to those provisions, the Postmaster General established procedures whereby annual rate postal employees were assigned to various five-day workweeks within a seven-day "service week", which ran from Saturday to Friday. Respondent Groettum requested, and was assigned to, a five-day workweek from Monday through Friday, with Saturday and Sunday as regular days-off. For one week in June 1966, Groettum was notified, in advance, that due to a temporary shortage of personnel, he was to work Saturday, Sunday, Tuesday, Wednesday and Thursday, with Monday and Friday as days-off. Although he only worked five days that week, Groettum sought overtime compensation for working on regularly scheduled days-off. The court of appeals held that Section 5 of the 1965 Act requires the Postmaster General to pay overtime compensation to an employee who is temporarily assigned to work on different days, even though the temporary schedule involves the same number of days of work during the service week as his regular schedule (App. A, *infra*, pp. 16–22).

REASONS FOR GRANTING THE WRIT

This case presents an important question in the administration of the Federal Employees Salary Comparability Act of 1965. The issue affects the overtime pay of approximately 450,000 Postal Field Service employees, and the decision below, if allowed to stand, would increase the operating expenses of the Post Office Department by at least $34 million annually. As we show below, both the language and the legislative history of the Act support the Postmaster

General's interpretation of the statute as not providing for overtime pay when the temporary rescheduling of work merely changes the days on which an employee works but does not increase the total number of days worked. At the very least, that history fails to show any express consideration of the extraordinary determination, which the court imputed to Congress, that postal workers must be paid 40 percent overtime for a 5-day 40-hour workweek when their regular workdays are temporarily rescheduled. In these circumstances, the decision below warrants review by this Court.

1. 39 U.S.C. (Supp. IV) 3573(a)(1) provides that an annual rate postal employee, such as respondent Groettum, shall be paid overtime compensation for work performed "in excess of his regular work schedule." The normal meaning of "excess" is "in addition to." On its face, therefore, the language Congress used covers only an employee who works longer than his regular schedule and not, as the court of appeals construed it, an employee who works "outside of" his regular schedule but on the same number of days (see App. A, *infra*, p. 17).

The legislative history of the Act confirms this conclusion. It shows that in providing for overtime pay to employees who worked "in excess of" their regular work schedules, Congress intended to cover only employees who worked a sixth day or a seventh day of the week and not those who merely worked different days.

Section 5 of the 1965 Salary Comparability Act was designed to correct the inequities which resulted from the fact that the Postmaster General had no

authority to make overtime premium payments to annual rate employees when they worked more than five days in a week. Every such employee could be required to work on Saturday or Sunday in addition to his Monday through Friday workweek, but was allowed only compensatory time off for the extra work performed. Thus, if in one week the employee was required to work a full seven days (Monday through Frdiay, plus Saturday and Sunday), he would only work three days in the following week.

In his message to Congress recommending the legislation, President Johnson stated that it would

> Authorize certain civilian employees not now receiving premium pay for overtime to receive such pay on an equal basis with other civilian employees.

(H. Rep. No. 792, 89th Cong., 1st Sess., p. 21). Shortly thereafter the Postmaster General, in submitting proposed legislation to the House, explained that the new legislation provided that annual rate regular employees would be paid overtime compensation "for required work in excess of the regular schedule, *i.e.*, over 8 hours in 1 day or for a sixth or seventh day of work" (*id.* at 23). In his testimony before the Senate Committee, the Postmaster General similarly emphasized that this was the intent of the proposed legislation (Hearings before the Senate Committee on Post Office and Civil Service on Legislation Pertaining to Federal Employees Compensation, 89th Cong., 1st Sess., p. 45):

> Regular employees should have a work schedule of 40 hours a week, consisting of five 8-hour days. For work in excess of that sched-

> ule—more than 8 hours in 1 day, or duty on a sixth or seventh day—premium pay will be required * * *.[4]

The Senate Committee Report indicates that Congress accepted the Postmaster General's definition of the term "in excess of his regular work schedule" as meaning work performed on a sixth or seventh day. The Committee stated: "Until now, * * * no regular employee has been paid for working a sixth or seventh day in the workweek." (S. Rep. No. 910, 89th Cong., 1st Sess., p. 5). In an appendix to the Report, which "explain[ed] the changes" in "overtime and holiday pay" for postal workers the bill would make, the Committee summarized the existing law as providing "Com-

[4] The Postmaster General also testified that "[a]ny work on a scheduled off day" would be paid at overtime rates (see Hearings, *supra*, p. 45). This statement, when read together with his other testimony, indicates that the Postmaster General was referring to work on a day in addition to the regular schedule, rather than a day in substitution therefor. In fact, as the 1965 Act originally passed the House (H.R. 10281, which eventually became the Federal Employees Salary Comparability Act of 1965), it would have retained the Monday-through-Friday workweek concept, so that a sixth or seventh day worked would have, by necessity, been on Saturday or Sunday. See H. Rep. No. 792, *supra*, p. 40. The Senate considered this Monday-through-Friday workweek, however, to be too restrictive and changed it so that "the Postmaster General shall have no statutory restriction upon scheduling employees to any 5-day workweek." S. Rep. No. 910, 89th Cong., 1st Sess., p. 6.

The Act also provides extra compensation of 25 percent for work performed on Sundays. 39 U.S.C. (Supp. IV) 3573(e). The overtime pay of 50 percent that employees who work on Sunday would receive under the court of appeals decision is instead of this 25 percent differential.

pensatory time off for Saturday or Sunday work" and the House and Senate versions of the bill as providing "1½ for over 8 hours a day or 40 hours a week * * *" (*id.*, p. 13).

A critical factor in the reasoning of the court of appeals was its premise that the temporary rescheduling of respondent Groettum's workweek involved the same use of "compensatory" time which Congress sought to correct in the 1965 Act (see App. A, *infra*, p. 20). But, as we have shown, the situation which concerned Congress was that, unlike their counterparts in private industry or other governmental agencies,[5] postal employees would be rewarded for working six or seven days in a week only by extra days-off in the following week. Such "compensatory time"—which was a substitute for premium payments which other employees generally received for working overtime—is entirely different from the postmaster's temporary rescheduling of the days-off of an employee who, like his colleagues, will work no more than five 8-hour days in the week. Both the words of the statute and the legislative history show that Congress, like other employers, has done no more than to give postal employees premium pay for work performed in addition to that done on a five-day workweek. Indeed, since the Act concededly authorizes the Postmaster General to require employees to work regularly on Saturday and Sunday as part of their five-day week without overtime, Congress certainly did not intend that overtime

[5] See S. Rep. No. 910, 89th Cong., 1st Sess., p. 5; H. Rep. No. 792, 89th Cong., 1st Sess., pp. 3–4.

be paid to employees who are merely required to do so temporarily.

2. The decision of the court of appeals would substantially increase the cost of operating the Post Office. The Post Office Department has estimated that, because of temporary rescheduling, approximately 4.5 percent of the almost 400 million total hours worked by postal clerks in fiscal 1969 will be performed on regular days-off. This estimate seems conservative, since it includes not only the emergency temporary rescheduling involved in this case, but also all other rescheduling which would require overtime payments under the rationale of the decision below, such as those caused by temporary assignments for the opening of new facilities, vacation scheduling, personnel actions and procedures, supervisory assignments, jury duty, etc. Moreover, it does not include any additional expenses covering about 157,000 mail carriers, 36,000 mail handlers, and several other classes who are eligible for overtime payments under the decision below but for whom reliable estimates are not available.

Under this estimate and at the basic overtime rate for postal clerks, the decision of the court of appeals would require $34 million in additional overtime payments in fiscal 1969. For future years, such payments would be at least as large, and probably larger in view of the 4.1 percent postal pay increase scheduled for July 1969. Furthermore, if the decision below were to be applied retroactively—as the union undoubtedly will subsequently contend—the Post Office estimates

that the increased cost from the effective date of the 1965 Act through fiscal year 1969 would exceed $100 million.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
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Attorneys.

JUNE 1969.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,685

UNITED FEDERATION OF POSTAL CLERKS, AFL-CIO, ET AL., APPELLANTS

v.

W. MARVIN WATSON, POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE

Appeal From the United States District Court for the District of Columbia

Decided February 27, 1969

Mr. Herbert S. Thatcher, with whom *Mr. Donald M. Murtha* was on the brief, for appellants.

Mr. Ralph A. Fine, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr., Messrs. David G. Bress,* United States Attorney, and *Alan S. Rosenthal,* Attorney, Department of Justice, were on the brief, for appellee. *Mr. Frank Q. Nebeker,* Assistant United States Attorney, also entered an appearance for appellee.

Before BAZELON, *Chief Judge,* WRIGHT and LEVENTHAL, *Circuit Judges.*

BAZELON, *Chief Judge:* In this action for declaratory judgment and injunctive relief, appellants challenge the Postmaster General's construction of Sections 3571 and 3573 of the Federal Employees Salary

Comparability Act of 1965.[1] These sections purportedly modernized the working conditions of postal emoloyees by providing overtime pay for overtime work in place of the anachronistic system of compensatory time off, but appellants say the Post Office has found an ingenious (but illegal) way to avoid the prescribed modernization. The District Court granted summary judgment against appellant Groettum and dismissed the complaint as to the appellant Federation for want of standing.

Under the Salary Act, set out in pertinent part in the margin,[2] the Postmaster General is required to

[1] 39 U.S.C. §§ 3571–75 (Supp. III, 1968).

[2] § *3571. Maximum hours of work*

(a) A basic workweek is established for all postal field service employees consisting of five eight-hour days . . . .

(b) The Postmaster General shall establish work schedules in advance for annual rate regular employees consisting of five eight-hour days in each week.

. . . .

(d) To the maximum extent practicable, senior regular employees shall be assigned to a basic workweek Monday through Friday, inclusive, except for those who express a preference for another basic workweek.

§ *3573. Compensatory time, overtime, and holidays*

(a) In emergencies or if the needs of the service require, the Postmaster General may require employees to perform overtime work or to work on holidays. Overtime work is any work officially ordered or approved which is performed by—

(1) an annual rate regular employee in excess of his regular work schedule,

(2) an hourly rate regular employee in excess of eight hours in a day or forty hours in a week, and

(3) a substitute employee in excess of forty hours in a week.

The Postmaster General shall determine the day and week used in computing overtime work.

"establish work schedules in advance for annual rate regular employees consisting of five eight-hour days in each week." Any annual rate regular who is required to work "in excess of his regular work schedule" must be paid overtime for such work. The Postmaster General has authority "to determine the . . . week used in computing overtime work."

Pursuant to this statutory scheme, the Postmaster General established a "service week" extending from Saturday to Friday. Appellant Groettum, a senior annual rate regular employee, was assigned a work schedule calling for a Monday-to-Friday workweek.[3]

[3] Latter-day Scholastics may enjoy defining and distinguishing the statutory terms "basic workweek" and "work schedule." First compare § 3571(a) with § 3571(b), *supra* note 2, to discover that the "basic workweek" established for all postal employees consists of five eight-hour days, whereas the work schedules of annual rate regular employees are to consist of five eight-hour days in each week. Before finally concluding that a work schedule specifies the particular five days an employee is to work, consider § 3571(d), which gives senior regular employees preference for a "basic workweek" of Monday through Friday.

Now add the definitions attempted in an agreement between the Post Office and the appellant Federation: "A basic workweek is five eight-hour days," including "fixed," "rotating," "periodic," or "flexible" "work cycles"; a "work schedule," on the other hand, is "a regularly scheduled tour of specific hours for each scheduled [by the work schedule or by the basic workweek?] service day within an established basic workweek."

The original House bill, H.R. 10281, 89th Cong., 1st Sess., 1965, amended Section 3571 to read in part: "A basic workweek is established for all postal field service employees, consisting of five eight-hours days excluding Saturday and Sunday. To provide service on days other than those included in the basic workweek, the Postmaster General shall establish work schedules in advance for annual rate regular employees consisting of five eight-hour days in each week. To the maximum extent

Thus, five days did appellant labor, and on the first and second day (of the service week) he rested. On Thursday, June 16, 1966, however, appellant was informed that because of a temporary shortage of personnel, his schedule for the next week was to be changed, so that he would work Saturday and Sunday and rest Monday and Friday. He did as he was told, but received no overtime pay for working on his regularly scheduled off days. At the end of the aberrant week he resumed his customary routine. He now contends that he should have been paid overtime for this weekend work "in excess of his regular work schedule."

Undaunted by this contention, appellee has in fact made such temporary changes in work schedules (without payment of overtime) an announced depart-

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possible, senior annual rate regular employees shall be assigned to the basic workweek . . . ."

H.R. REP. No. 792, 89th Cong., 1st Sess. 40 (1965). This version was ultimately rejected, however, because it was thought unduly to restrict the Postmaster General's discretion to schedule weekend work. (As written, the section could have been construed as excluding altogether scheduling hourly rate and substitute employees outside the Monday-to-Friday workweek.) This earlier provision does, however, provide insight into what was once meant by a "basic workweek"—namely, the days ordinarily to be worked by all employees except those annual rate regular employees who were assigned different work schedules in advance. What the establishment of a "basic workweek" *now* means is anybody's guess.

Fortunately, we are not required to construe the term "basic workweek" in this case. We understand the term "work schedule" to refer to the scheduled days and hours to be worked by annual rate regular employees in a service week. By the non-statutory term "workweek," we mean simply the work days designated in the work schedule.

mental policy.[4] As a result, the appellant Federation has other complaining members, present and prospective, besides Groettum, and seeks equitable relief against this established practice.

I

Appellee appears to regard as the central issue his right to make temporary changes in established work schedules to meet emergencies and transitory needs of the service.[5] He notes that nothing in the Act expressly prohibits such temporary changes, so long as they are made "in advance" and so long as they do not require more than five days' work in any service week (or more than eight hours in any day). And he points to legislative history which indicates Congressional concern to avoid interfering with his authority to schedule weekend work where necessary.[6]

We agree that under the Act appellee may temporarily alter work schedules upon proper notice given

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[4] Postal Bulletin 20553, September 22, 1966, announces: "Temporary changes in hours and days of work shall not be made unless service needs at an installation preclude adherence to regular work schedules; such temporary changes shall be held to a minimum. Employees shall be given as much advance notice as possible of temporary work schedules, but in no case shall they be notified later than the end of their tours of duty the preceding Wednesday. If notified after Wednesday, employees required to work outside their regular schedules shall be compensated at the overtime rate if permitted by law . . . ."

[5] Appellee's contention that this is an unconsented suit against the Government is far wide of the mark. At its hoariest, the doctrine of sovereign immunity has not barred adjudication of a suit claiming that a Government officer is acting outside his statutory authority and thereby depriving the plaintiff of statutory rights. *United States* v. *Gates*, 148 U.S. 134 (1893); *Dugan* v. *Rank*, 372 U.S. 609, 621 (1963).

[6] *See* note 3 *supra;* note 19, *infra.*

"in advance." Not only is there no express bar against such changes, but the Act repeatedly refers to "regular work schedules,"[7] thus plainly implying the possibility of temporary alterations. The question, however, is whether the employees whose schedules have been disrupted are entitled to premium pay for any regularly scheduled off days they are required to work. The statute calls for overtime compensation for any work "in excess of [the] . . . *regular* work schedule."[8] If we are to give any force to the word regular in this provision, we cannot accept appellee's contention that Congress intended to pay overtime only for work in excess of eight hours in one day or five days in any service week. All work schedules for annual rate regular employees under the Act consist of five eight-hour days,[9] and if Congress meant to limit overtime to work quantitatively in excess of the statutorily defined "work schedule," the word "regular" was mere surplusage. Moreover, for all *other* postal employees, the Act defines overtime quantitatively in terms of the number of hours and days worked.[10] That it chose a different formulation in terms of "work schedule" for annual rate regulars strongly suggests that it had an additional nonquantitative consideration in mind—namely, *which* days and hours in particular the employee was compelled to work.[11]

Admittedly, Congress could have expressed this intent at a saving of untold confusion if it had simply called overtime any work "outside of" the regular work schedule. In addition, there is some language

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[7] 39 U.S.C. § 3573(a)(1), *supra* note 2; 39 U.S.C. § 3573(e); 39 U.S.C. § 3573(h)(1), (2); (3).

[8] 39 U.S.C. § 3573(a)(1), *supra* note 2 (emphasis added).

[9] 39 U.S.C. § 3571(b), *supra* note 2.

[10] 39 U.S.C. §§ 3573(a)(2) and (3), *supra* note 2.

[11] For amplification and confusion concerning the term "work schedule," *see* note 3, *supra*.

in the legislative history to support the view that overtime under the Act is only work "on a sixth or seventh day" or for "more than eight hours a day." [12] In many

[12] In support of the proposed legislation ultimately enacted as the Salary Act, Postmaster General Gronouski told the Senate Post Office and Civil Service Committee that

> [r]egular employees should have a work schedule of 40 hours a week, consisting of five 8-hour days. For work in excess of that schedule—more than 8 hours in one day, or duty on a sixth or seventh day—premium pay will be required.

Hearings on H.R. 10281 Before the Senate Committee on Post Office and Civil Service, 89th Cong., 1st Sess. 42–48 (1965) [hereinafter cited as "*Hearings*"]. On the other hand, in the same testimony, Mr. Gronouski went on to say that

> any work *on a scheduled day off* would be paid at the rate of time and a half in cash rather than in compensatory time off.

Id. (emphasis added).

The Senate Committee itself said only that

> regular employees . . . will be paid for any overtime work (regular employees have an advance-schedule basic workweek of five eight-hour days)

S. Rep. No. 910, 89th Cong., 1st Sess. 5 (1965). Inferences to be drawn from its use of the language "advance-scheduled basic workweek are left to the imagination. The statute seems to say that while *all* employees have a "basic workweek," § 3571(a), *supra* note 2, only *annual rate* regular employees are entitled to "work schedules" established "in advance." § 3571(b), *supra* note 2. Moreover, as noted in the text, the statute provides different overtime formulae for annual rate regulars than for hourly rate regulars. But in a tabular summary of the effect of its legislation, the Senate Committee again lumps together all regular employees by describing overtime for "regulars" as "over 8 hours a day or 40 hours a week." S. Rep. No. 910, *supra*, at 12 (Appendix A–1).

The House Report does take note of the apparently unique standard of overtime set for annual rate regulars. It says, correctly, that overtime for an hourly rate regular employee is

respects besides this one, the statute will not be remembered as a classic of lucid drafting. But the major thrust of the legislative history and the tenor of the statute as a whole support the construction advanced by appellants.

In endorsing the Act then pending before the Senate Post Office and Civil Service Committee, Postmaster General Gronouski expressed his "amazement" at the "antiquated, unsatisfactory" overtime practices then in effect in the Post Office Department.[13] One of these practices was that

> our regulars, ostensibly assigned Monday-through-Friday schedules, were getting only compensatory time for working many Saturdays and Sundays.

Such employees were entitled to compensatory time off within five days of any weekend they were obliged to work, but were paid no overtime.[14] The 1964 Act was intended to remedy this, as well as other anomalies in the conditions of postal employ.[15]

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work performed in excess of 8 hours a day or 40 hours a week." In contrast, overtime for an annual rate regular is any work performed "in excess of his basic workweek schedule." H.R. REP. No. 792, *supra* note 3, at 8. This formulation adds the concept of a "basic workweek schedule" to the ranks of the "basic workweek" and the "work schedule," but contributes little else to general understanding.

In sum, the bits of legislative history explaining the meaning of the overtime provision are not very enlightening.

[13] Hearings, *supra* note 12.

[14] Under the prior law, employees at or below the salary level PFS–7 could not be paid overtime for weekends worked except, at the discretion of the Postmaster General, during the month of December, 39 U.S.C. § 3573(2)(a) (1964).

[15] See Hearings, *supra* note 12; H.R. REP. No. 792, *supra* note 3, at 7; S. REP. No. 792, *supra* note 12, at 5.

Appellants say with considerable justice that on appellee's construction of the Act, the ostensible abolition of compensatory time off was a grand gesture which accomplished nothing. Under the archaic system which amazed Postmaster General Gronouski, an employee who worked the weekend was compensated by two holidays before the next weekend. Under the new, modern overtime system as construed by the present Postmaster General, that is precisely the compensation received by appellant Groettum for his weekend labors. Under the guise of a "temporary change" in his work schedule, he worked Saturday and Sunday and was rewarded with vacations on Monday and Friday. If this procedure was legal, compensatory time off was abolished in name only, and the Post Office need never pay its annual rate regulars overtime for working on off days unless it neglects to change (temporarily) their regularly scheduled work week in advance.[16] We cannot lightly assume that Congress's mighty labors brought forth such a mouse.

Moreover, elsewhere in the Act Congress specifically provided that

> Each regular employee whose regular work schedule includes an eight-hour period of service any part of which is within the period commencing at midnight Saturday and ending at midnight Sunday shall be paid extra compensa-

[16] Thus, for annual rate regulars, the only substantial change from the old compensatory-time system on appellee's reading would be that the Post Office would have to pay them overtime if it should wish to work them all seven days of any service week. Such balm as they might derive from this advance must be tempered by the knowledge that the new system contains no restriction on the number of consecutive days they can be required to work, whereas the old law required two days off within five days of any worked weekend. *See* note 14, *supra*.

> tion at the rate of 25 per centum of his hourly rate of basic compensation for each hour of work performed during that eight-hour period of service.[17]

Thus, if appellee's construction were correct, while an employee whose regular work schedule includes Sunday would be paid extra for his Sabbatical labors, an employee who is worked Sunday only during temporary emergencies on short notice would receive no bonus at all for his unwonted pains. This result would be contrary to the Post Office's own theory of premium pay as a device

> (1) to encourage the employer to hire additional workers rather than pay a premium, and (2) to pay a differential to scheduled employees for inconveniencing them for working beyond their schedule.[18]

We are satisfied that no such anomalous result was intended.

It is true, as appellee insists, that Congress was careful not to circumscribe Post Office authority to schedule weekend work. To that end it eliminated any presumption in favor of a Monday-to-Friday workweek[19] and provided only that senior regular em-

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[17] 39 U.S.C. § 3573(e).

[18] Hearings, *supra* note 12 (Statement of Assistant Postmaster General Murphy).

[19] Under the old law, *supra* note 14, the workweek was assumed to be Monday-to-Friday unless adjusted on account of extra work on the preceding weekend. The original House bill leading to passage of the 1965 Act provided for a "basic workweek . . . excluding Saturday and Sunday," which the Senate Committee found too restrictive. See note 3, *supra*. The Committee decided the Postmaster General should have "no statutory restriction upon scheduling employees to any 5-day workweek." S. REP. No. 910, *supra* note 12, at 6. As we con-

ployees should have preference for that schedule "to the maximum extent practicable." [20] Instead of a nominal Monday-to-Friday norm often observed in the breach, we think Congress offered a regular predictable schedule,[21] including extra pay for any non-scheduled days. This scheme improves the conditions of postal employ without impeding the flow of the weekend mail. In short-term emergencies for which the regularly scheduled contingent is inadequate, the Postmaster General may schedule (1) substitutes at regular pay, (2) hourly rate regular employees at regular pay, or (3) additional annual rate regulars on their days off at overtime rates. Moreover, nothing in this opinion impairs the Postmaster General's discretion under the Act to eliminate or curtail the need for overtime work by changing the *regular* work schedules of as many employees as may be necessary—a question not involved in this case, where there is no contention that any such changes were made.

II

The remaining question is whether the appellant Federation is entitled to judgment in its favor as well, thereby supplying the predicate for injunctive relief. The Federation claims standing to sue on be-

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strue it, the Act imposes no such restrictions on scheduling, but only requires that overtime be paid for work done outside the regularly scheduled 5-day workweek.

[20] 39 U.S.C. § 3571(d), *supra* note 2.

[21] Indeed, without this assurance of regularity, annual rate regular employees who are not assigned Monday-to-Friday workweeks would be worse off under the new Act than under the old, for they must now work Saturdays or Sundays or both as a matter of course, whereas formerly they worked weekends only when the needs of the service required.

half of its members in order to vindicate their rights under the Salary Act.[22]

The courts have come increasingly to recognize the standing of associations to raise in some circumstances the rights of their members.[23] Where the principle of avoidance of constitutional issues is not involved, the primary requisite for agrant of standing is an interest sufficient to insure

> that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor. . . .[24]

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[22] The Federation also argues that its "collective bargaining" agreement with the Post Office incorporates the Salary Act and that it therefore has standing to sue to enforce the provisions of the agreement to which it was a party. In view of our disposition of its alternate argument, we do not reach the questions of whether the Post Office is in breach of its agreement and whether, if so, a court would have jurisdiction to enforce against the Goverment an agreement authorized only by an Executive Order issued under 5 U.S.C. § 7301. Cf. *Manhattan-Bronx Postal Union* v. *Gronouski*, 121 U.S. App. D.C. 321, 350 F. 2d 451 (1965), *cert. denied*, 382 U.S. 978 (1966); *National Ass'n of Int. Rev. Employees* v. *Dillon*, 123 U.S. App. D.C. 58, 356 F. 2d 811 (1965). *But see* Forkosch, *Executive Order 10988: The Sovereign's Immunity*, 22 N.Y.U. INTRA. L. REV. 1 (1967).

[23] *E.g.*, NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 357 U.S. 449 (1958); Smith v. Board of Education, 365 F.2d 770 (8 Cir. 1966); MacArthur Liquors, Inc. v. Palisades Citizens Ass'n, 105 U.S.App.D.C. 180, 265 F.2d 372 (1959); Buford v. Morganton City Board of Education, 244 F. Supp. 437 (W.D.N.C. 1965). *See also* UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966).

[24] Flast v. Cohen, 392 U.S. 83, 106 (1968); Curran v. Clifford, December 27, 1968) (slip opinion, p. 6).

Thus, we have allowed associations to assert their members' interests when the "association is an authorized spokesman organized to promote these interests for its individual members." [25] In such cases, absent evidence to the contrary, it is reasonable to assume that the representative speaks effectively for his constituency.[26]

The appellant Federation is recognized by the Post Office Department as the exclusive representative of Departmental employees.[27] It is charged with representing the interests of all postal employees without discrimination [28] and, in particular, with processing their grievances arising under the Salary Act through all stages of internal administrative review.[29] Indeed, it has participated intimately, through agreements and consultations with the Post Office, in the very implementation of the Act. There is no reason to doubt that, as regards the matter at bar, it fully and effectively represents the interests of at least large numbers of its members.[30] In the circumstances of this case, we think

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[25] Citizens Ass'n of Georgetown v. Simonson, —— U.S.App. D.C. ——, 403 F.2d 175; Curran v. Clifford, *supra* note 24; MacArthur Liquors, Inc. v. Palisades Citizens Ass'n, *supra* note 23.

[26] To what extent a judgment obtained by the representative would be *res judicata* as to members whose interests might diverge is a difficult question which we need not resolve. *See generally* 1B Moore, Federal Practice § 0.411[12], n. 36 (2d edit. 1965).

[27] Pursuant to Section 6 of E.O. 10988, 27 Federal Reg. 551, 553 (1962).

[28] E.O. 10988 § 6(b), *supra* note 27.

[29] It appears, however, that individual employees may process their own grievances if they wish. *See* E.O. 10988 § 3(c)(1), 27 Fed. Reg. at 552.

[30] Its standing does not depend on any unanimity of interest in the matter at bar on the part of all its members. *Citizens*

it artificial and pointless to cut off its representative functions at the courthouse door.[31]

Appellee protests that, notwithstanding, the Federation is not a "real party in interest" under F.R. Civ. P. 17(a). Our decision that the Federation has standing to sue, however, is dispositive of an objection under 17(a).[32] That rule was not thought to bar suit in any of the above-cited cases in which associations had standing to sue on behalf of their members.[33] Though not articulated in those cases, the reason appears to lie in the limited purpose of the rule to protect defendants against a subsequent suit on a cause of action previously adjudicated with another plaintiff.[34] It does not bar a suit by a bona fide repre-

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Ass'n of Georgetown v. *Simonson*, *supra* note 25; *MacArthur Liquors, Inc.* v. *Palisades Citizens Ass'n*, *supra* note 23. The parties agree that the rule of law decided in appellant Groettum's case will govern the similar grievances of other annual rate regular employees.

[31] Compare the observation of the Supreme Court in allowing a union to enforce the contract rights of its members under Section 301 of the Labor Management Relations Act of 1947, that "the union's standing to vindicate employee rights . . . implements no more than the established doctrine that the union's role in the collective bargaining process does not end with the making of the contract." *UAW* v. *Hoosier Cardinal Corp.*, *supra* note 23, 383 U.S. at 700. *See also* the dissenting opinion of Justice Douglas in *Westinghouse Employees* v. *Westinghouse Corp.*, 348 U.S. 437, 465–67 (1955) (*overruled* in *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962), and *UAW* v. *Hoosier Cardinal Corp.*, *supra*.

[32] *Smith* v. *Board of Education*, *supra* note 23, 365 F.2d at 777.

[33] *Supra*, note 23.

[34] "In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to *allow* an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against subsequent action by the party

sentative on behalf of real parties in interest which will have the effect of *preventing* a multiplicity of suits.[35]

We reverse and remand to the District Court with instructions to enter judgment in accordance with this opinion.

Reversed and remanded.

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actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata."

Committee Note of 1966 to Amended Rule 17(a), 3A MOORE, FEDERAL PRACTICE § 17.01[8] (2d edit. 1967). Even if not all Federation members would necessarily be barred from subsequent litigation over the matter at bar, *see* note 26, *supra*, appellee is protected from suit on as many potential individual causes of action as the number of members the Federation effectively represents. Thus, from the standpoint of the purpose of the rule, allowing the union to sue is all to appellee's advantage.

[35] *See* note 34, *supra*.

Nor is a suit on behalf of members barred because the Federation cannot meet the requirements of F.R. Civ. P. 23(a) for a class action. *Smith* v. *Board of Education*, *supra* note 23, 365 F. 2d at 777.

Appellee also contends that this suit is precluded by the terms of E.O. 10988, *supra* note 27, which provides in Section 6(b) that an agency's obligation to permit union participation in agency administration "shall not be construed to extend to such areas of discretion and policy as . . . the assignment of its personnel." 27 Fed. Reg. at 554. But this provision plainly does not affect a union's standing to sue on such matters when they have been removed from agency discretion by statute.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21,685

UNITED FEDERATION OF POSTAL CLERKS, AFL–CIO ET AL., Appellants

v.

W. MARVIN WATSON, POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before: BAZELON, *Chief Judge*; WRIGHT and LEVENTHAL, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and this case is remanded to the District Court with instructions to enter judgment in accordance with the opinion of this Court filed herein this date.

Per Curiam For the Court:

NATHAN J. PAULSON, *Clerk.*

Dated: February 27, 1969.

Opinion by Chief Judge Bazelon.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 290.

WINTON M. BLOUNT, Postmaster General,
Petitioner,

v.

UNITED FEDERATION OF POSTAL CLERKS, AFL-CIO, et al.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 290.

WINTON M. BLOUNT, Postmaster General,
Petitioner,

v.

UNITED FEDERATION OF POSTAL CLERKS, AFL-CIO, et al.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondents ask that the petition for a writ of certiorari filed herein be denied.[1]

RESTATEMENT OF QUESTION PRESENTED.[2]

Whether the provisions of the Federal Employees Salary Comparability Act of 1965 requiring the Postmaster

[1] References to the Petition, which includes in Appendix A the decision of the Court of Appeals, will be shown in Respondents' Brief by the following abbreviation "Pet. p. ...".

[2] The reason we cannot agree with the Petitioner's "Question Presented" is that it departs from his position in the Court of Appeals where he stated the question to be:

> "Whether the 'temporary change' of appellant Groettum's basic workweek assignment in June 1966, was within the lawful discretionary authority of the Postmaster General."

General to establish regular work schedules for annual rate employees consisting of five eight-hour days in each week, also required the Postmaster General to adhere to such regular work schedules and pay the statutory wages, or whether he may establish such work schedules and then "temporarily" abandon such schedules and unlawfully require an employee to stay away from work on some of his regular days and work on off days without the payment for such off days at the overtime rate, with the result that the Postmaster General is following a practice abolished by Congress of working employees on off days and compensating for such work only with compensatory time off.

STATEMENT.

Congress in the Federal Employees Comparability Act of 1965 (hereinafter referred to as "the Act") corrected earlier Acts of Congress which had for many years permitted the Postmaster General to work postal employees on Saturday and Sunday and to pay for it by allowing time off during the next five days on a hour for hour basis. This was known in the repealed statute as compensatory time, or compensatory time off.[3] Thus twenty years after the Federal Employees Pay Act of 1945, which gave overtime benefits to most of the employees in the competitive Civil Service, the Postal Employees were, at last, placed more equally in line with employees in the public and private sectors.[4]

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[3] 39 U. S. C. (1964 ed.) 3573.

[4] The extensive record of the Hearings before the Senate and House Committees included tables reflecting the practice of industry of providing regular five day work weeks which were enforced by requiring overtime payments for hours over 40 or, for the 6th and 7th days worked as such, or premiums paid for work on off days (Attachment to letter of Secretary of Labor Wirtz, pp. 225-232—Hearings before the Committee on Post Office and Civil Service, United States Senate, 89th Congress, First Session on Federal Pay Legislation; Hearings before Sub-

The new law was carefully tailored to the needs of the Postal Service. Under it the Postmaster General first established a "service week" consisting of seven days running from Saturday through Friday. Within this period he was required to, and did establish, for annual rate regulars, basic work weeks, in advance, consisting of work schedules of five eight-hour days. The Postmaster General, under the Act, may establish any pattern of five fixed work days and two days outside of the schedule. For the respondent Groettum, who had bid for and was assigned a regular schedule, the regular schedule was Monday through Friday and his two off days were the Saturday and Sunday which preceded his regular schedule, but within the same "service week" of seven days.[5]

The violation, in simple terms, as to respondent Groettum took place in this fashion. On Thursday, June 16, 1966, he was told by the Postmaster to come in and work on his two off days, i. e. Saturday and Sunday, and to stay away on the following Monday and Friday. He was paid only the equivalent of his regular pay for the period. The pay received and the effect of the practice followed are identical with the outlawed practice of granting com-

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committee on Compensation, Committee on Post Office and Civil Service, House of Representatives, First Session on H. R. 8307 and similar bills July 19, 1965; S. Rep. No. 910, 89th Cong., 1st Sess., p. 5).

[5] The Postmaster General in consultation with the postal unions worked out an elaborate system for determining types of scheduled workweeks to meet the needs of the postal service, for posting these schedules and receiving bids and for making official assignments (Postal Bulletin No. 20520, Mar. 4, 1966, being Exhibit D, attached to the complaint and excerpted pp. 42-47 of the Joint Appendix). The Postmaster General then proceeded in the weeks following Mar. 4, 1966, to determine and officially assign regular work schedules to all of the employees in the Department. It was following this that the Petitioner issued instructions authorizing temporary changes in regular work schedules without payment of statutory wages. The facts as to Groettum are typical of the general practice affecting a large number of employees in the postal service.

pensatory time off on an hour-for-hour basis.[6] The Postmaster General failed to comply with the Act which required adherence to the established regular work schedule of Monday through Friday for respondent Groettum and the payment of 150 per centum of the hourly rate of basic compensation for the two off days.

The careful "tailoring" of the provisions of the Act is reflected throughout its language and particularly in the overtime provisions. Thus a "substitute" employee would be paid overtime only by working in excess of 40 hours; the same is true of "hourly" employees. However, for "annual rate regulars", overtime was not based on the concept of the number of hours worked, but whether the employee was required to work in excess of his regular work schedule.[7] From this bare statement of the law and the circumstances, it follows that the Court of Appeals was correct in its application of the law. The decision, however, reflects a careful weighing of the legislative history, the language of the Act and the pertinent facts.

---

[6] The only exception to this under the old law was that during the month of December the statute required **"for work performed on Saturdays and Sundays" payment to an employee "at the rate of 150 per centum of his hourly basic compensation"** (39 U. S. C., 1964 ed. 3573).

[7] 39 U. S. C. 3573 as Amended:

"§ 3573. Compensatory time, overtime, and holidays

(a) In emergencies or if the needs of the service require, the Postmaster General may require employees to perform overtime work or to work on holidays. Overtime work is any work officially ordered or approved which is performed by—

(1) an annual rate regular employee in excess of his regular work schedule,

(2) an hourly rate regular employee in excess of eight hours in a day or forty hours in a week, and

(3) a substitute employee in excess of forty hours in a week."

REASONS FOR DENYING THE PETITION.

The position advanced by the Petitioner in the Court of Appeals was that he could temporarily abandon a statutorily established regular work schedule and create a new statutory work schedule of five eight-hour days provided he applied the new schedule only on a "temporary" basis.[8] For obvious reasons the Petitioner has abandoned this position and substituted a confession and avoidance theory coupled with a plea for mercy. Admitting that he cannot lawfully change an employee's established regular work schedule on a "temporary" basis, he is now claiming that although he acted improperly in sending Groettum (and other employees) home on two regular work days this permits him now to assert "although I violated the obligation imposed by statute nevertheless the employee must actually work his regular schedule in order to bring into operation the overtime provisions of the Act which require extra pay for working on off days."

The flaw in Petitioner's position is that he fails to recognize that Congress anticipated and guarded against just such an approach, for, as the Court of Appeals points out, Congress chose different language to be applied to regularly scheduled annual rate employees (Pet. p. 17). Thus an annual rate regular is to be paid overtime for work in "excess of his regular work schedule" (Pet. p. 3), whereas substitutes and hourly rate regular employees receive overtime only for work in excess of forty hours in a week (Pet. p. 3). Although Petitioner does not spell

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[8] Postal Bulletin No. 20553—September 22, 1966 reads in part:

> "Temporary changes in hours and days of work shall not be made unless service needs at an installation preclude adherence to regular work schedules; such temporary changes shall be held to a minimum. Employees shall be given as much advance notice as possible of temporary work schedules, but in no case shall they be notified later than the end

out his new theory it is inherently based upon the assumption that while the law requires him to establish regular work schedules he is not bound, thereafter, while such regular schedules are in effect, to adhere to such schedules.[9] Whether under the Petitioner's old approach or his new, the result is the same. In the language of the Court of Appeals "If this procedure were legal, compensatory time was abolished in name only and the Post Office need never pay its annual wage regulars overtime for working on off days."

The decision below was correct and Petitioners have no merit in their present contention. This case does not present any new questions of law for this Court to determine. The well reasoned and unanimous decision of the Court of Appeals was based upon principles long established by this Court. The Postmaster General has no authority to rewrite the law as passed by Congress, nor to ask this Court to do so. **U. S. v. Gates**, 148 U. S. 134 (1893).[10] This Act, which was before the Court of Appeals, is an overtime statute. Overtime laws fall into

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of their tours of duty the preceding Wednesday. If notified after Wednesday, **employees required to work outside their regular schedules** shall be compensated at the overtime rate if permitted by law . . . Temporary changes shall be reviewed each week. If a temporary change continues beyond two consecutive weeks, the exclusive organization may consult with the installation head to ascertain the reasons and expected duration.—"
(Referred to by Court of Appeals, Pet. pp. 15, 16 and see ftn. 4, p. 16 of Petition).

[9] Sec. 5 of P. L. 89-301 created a new and comprehensive design whereby initially the petitioner was required for the first time to "establish" regular work schedules (39 U. S. C. (Supp. IV) 3571), and, in Sec. 3573, to pay overtime rates for overtime work.

[10] In **U. S. v. Gates**, the Supreme Court held that the Postmaster General must pay overtime for hours over eight in one day as the law required, and could not pay for it by sending employees home early on Sundays and holidays and by this device avoid the directive of the statute by averaging out the hours on a weekly basis.

the category of social legislation which requires a liberal interpretation to effect its purposes. **U. S. v. Silk**, 331 U. S. 704 at 712, 91 L. ed. 1757 at 1767, 67 S. Ct. 1463.

Furthermore the principle that employers may not develop **ingenious** plans and devices to deprive employees of their statutory rights under overtime statutes is well settled not only in U. S. v. Gates, supra, but also in cases arising under the Fair Labor Standards Act (e. g. **Walling v. Helmrick & Payne, Inc.**, 323 U. S. 37, 65 S. Ct. 11, 89 L. ed. 29).

The statutory language is precise and uses language well known in the field of overtime practices both in the public and private sectors. The legislative history has also made clear that Congress intended to modernize the over time practices which prior to October 1965 were nonexistent in the Post Office Department except for the month of December (supra ftn. 5 p. 3).[11] The language selected made clear the intention of the legislators as expressed in the legislative history; that is, employees were to have a "regular predictable schedule" (Pet. p. 22) and were to be paid a premium rate when they worked outside of the regular scheduled hours which the Department was required to establish. This was made pointedly clear in the use of a different terminology in defining "overtime work" for "annual rate regular employees", as distinguished from "hourly rate regulars" and "substitute employees" (5 U. S. C., Supp. IV, 3573 (a) (1), (2), (3), Pet. p. 3).

Had the Postmaster General's interpretation been allowed to prevail, not only would there be no distinction between the various categories of employees, as Congress specifically provided, but the regular rate annual em-

[11] While it is difficult to conceive that one of the largest employers in the Western World would by 1965 not have established regular days of work and regular days of rest on which his employees could rely, it is even more inconceivable that in 1969 he would still continue to resist such modernization.

ployees would be in exactly the same position which prevailed under the abandoned compensatory time off statute which preceded the amendments.[12] It cannot be assumed that Congress, after extensive hearings and after expressing an intention to bring the regular rate postal employees in line with practices which prevail not only for regular Civil Service employees, but for private industry as well, enacted a law which places the postal employees in a position even worse than before—for to do so would be to assume that Congress intended a nullity or was hoodwinking the postal employees (Pet. p. 22, ftn. 21).

The second point made by Petitioner,[13] the cost involved, is not worthy of a great Department of this government.

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[12] The pertinent provision of Title 39, U. S. C., 1964 ed. 3573 prior to the amendment of 1965 read as follows:

> § 3573. Compensatory time, overtime, and holidays.
>
> "In emergencies or if the needs of the service require, the Postmaster General may require employees to work more than eight hours in one day, or on Saturdays, Sundays or holidays. For that service he shall grant employees in the 'PFS' Schedule compensatory time or pay them overtime compensation under the following rules:
>
> (1) Each employee in or below salary level PFS-7 shall be paid for all work in excess of eight hours in one day at the rate of 150 per centum of his hourly basic compensation.
>
> (2) Each employee in or below salary level PFS-7 who performs work on Saturdays or Sundays shall, under regulations prescribed by the Postmaster General, be granted compensatory time in an amount equal to the excess time worked within five working days, except that, in lieu of such compensatory time, the Postmaster General may, if the exigencies of the service require, authorize him to be paid, for work performed on Saturdays and Sundays during the month of December, at the rate of 150 per centum of his hourly basic compensation."

[13] Petitioner speaks of a "forty per cent" overtime rate on page 6 of his Petition. Respondent assumes that this is a typographical error and in any event they are not aware of any basis for that figure arising from the decision of the Court of Appeals.

The violations, as the record shows, were made deliberately in the face of constant protest, orally and in writing by the Federation and by individual employees, in grievance processing and by litigation beginning in the Groettum case within 10 days after the violation (his grievance was filed July 1, 1966). Consequently, the Postmaster General should not at this late date begin to worry about the extent to which he has deprived his employees of their statutory rights. Whatever overtime costs would evolve from violations were facts ascertainable at the time the unlawful program was innovated in 1966. Surely, if he were deeply concerned about money, Petitioner would not have waited 120 days to file his petition in this court. Although the amount, whether great or small, is not a matter going to the question of whether petitioner can ignore an Act of Congress, respondent believes it appropriate to point out that there is no word or figure in the record in this case to support the "scare figures"—this suit is concerned only with bringing petitioner into compliance. Finally, as the Court of Appeals spelled out, the Petitioner may reduce the cost of overtime by employing substitutes and hourly rate regular employees (Pet. p. 22).

CONCLUSION.

The Petition for a writ of certiorari should not be granted.

Respectfully submitted,

HERBERT S. THATCHER,

DONALD M. MURTHA,
Attorneys for Respondents.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 290

WINTON M. BLOUNT, POSTMASTER GENERAL,
PETITIONER

v.

UNITED FEDERATION OF POSTAL CLERKS,
AFL-CIO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

---

1. Respondents contend (Br. in Opp. 3-4) that, because respondent Groettum was told on Thursday that he would be required to work on Saturday and Sunday of that week and could take off Monday and Tuesday of the following week, the Postmaster General's interpretation of the 1965 legislation permits him to continue "the outlawed practice of granting compensatory time off on an hour-for-hour basis."

This argument is unsound and, in any event, is beside the point.

a. The contention ignores the fact that one of the major changes made by the 1965 legislation was a substitution of a so-called "service week" for postal employees, to be established by the Postmaster General, for the old fixed Monday-to-Friday workweek. The Postmaster General established a service week that runs from Saturday to Friday. Groettum thus was not required to work a sixth and seventh day in the same week, but was merely required temporarily to shift the five days during which he worked in the next "service week."

b. More importantly, this was not the basis upon which the court of appeals decided this case. The fact that Groettum's temporary shift of workdays was from Monday and Tuesday to Saturday and Sunday during one service week was coincidental. Both the Union and Groettum were plaintiffs in this suit. Under the court of appeals' interpretation of the statute, which respondents presumably also espouse, a postal employee whose regular scheduled workweek was from Saturday through Wednesday would be entitled to overtime if in a particular week he was required to work Thursday and Friday instead of Tuesday and Wednesday. It is this award of overtime pay when a postal employee is required temporarily to work on days other than his regular schedule but still only five days a week, which we are challenging in the petition as unjustified by the statute.

2. Respondents further contend (Pet. 8-9) that the Post Office's estimate of the substantial additional costs that this decision would entail (see the Petition pp. 10-11) are "scare figures" without any support in the record. One of the estimates given was that, if the decision were applied retroactively, it would cost more than $100 million from the effective date of the Act through fiscal year 1969. On June 13, 1969, the respondent union, respondent Groettum and two other postal employees filed, for themselves and on behalf of all other postal employees similarly situated, a suit for back wages seeking to apply the decision below retroactively to the effective date of the Act. *United Federation of Postal Clerks, et al.* v. *United States and Winton M. Blount, Postmaster General,* Civil Action No. 1611-69 (D.D.C.). The Postmaster General's concern over the likely financial impact of this decision was fully justified.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1969.

END